RECENT DECISIONS.

ADMINISTRATION—PROPERTY OF NON-RESIDENT DECEDENT BROUGHT INTO STATE AFTER DEATH.—A resident of Ohio died in Missouri while there on a temporary visit. Proceeds from the sale of land owned by him in Ohio were brought into Missouri after his death. No administration had been granted in Ohio. *Held*, ancillary administration was properly granted in Missouri. *Turner* v. *Campbell* (Mo. 1907) 101 S. W. 119.

The principle of this case has been generally upheld, though the deceased died in the state of his residence, where assets were subsequently brought into the jurisdiction. *Miller* v. *Jones' Admr.* (1855) 26 Ala. 247; *Ela's Appeal* (1894) 68 N. H. 35; *Johnston* v. *Smith* (N. Y. 1881) 25 Hun 171; *Green* v. *Rugely* (1859) 23 Tex. 539; contra, *Embry* v. *Millar* (Ky. 1818) 1 A. K. Marsh 300; *Wright* v. *Beck* (Miss. 1848) 10 Sm. and M. 277, due to statutory interpretation. If administration has been granted in the state of residence, ancillary administration will not be granted in another state where effects are afterwards conveyed, because such property is not unadministered. *Treadwell* v. *Rainey* (1846) 9 Ala. 590; *Matter of McCabe* (N. Y. 1903) 84 App. Div. 145; *Varner* v. *Bevil* (1850) 17 Ala. 286. When assets are taken away from the state of domicil for temporary, fraudulent, or illegal purposes, ancillary administration is refused. *Christy* v. *Vest* (1873) 36 Ia. 285; *Matter of Hughes* (1884) 95 N. Y. 55. The possible injustice to the creditors of the decedent in the state of his residence on account of ancillary administration granted elsewhere, is not serious, as the disposition of the funds realized in the state granting ancillary administration rests largely in the court's discretion. *Harvey* v. *Richards* (1818) 1 Mason 381; *Matter of Hughes, supra.*

CONSTITUTIONAL LAW—GARNISHMENT—SITUS OF DEBT.—Wages payable in State A. were earned in said state by a citizen thereof. The employer was within the jurisdiction of State B. for purposes of suit; and by virtue of a statute of State B. the wages were garnished therein. *Held*, that though by previous decisions the situs of a debt was fixed at the domicil of the creditor, the statute was constitutional. *Harvey* v. *Thompson* (Ga. 1907) 57 S. E. 104.

It has been held that the situs of a debt to be garnished is the residence of the creditor; *Mason* v. *Beebe* (1890) 44 Fed. 550; *L. & N. R. R.* v. *Nash* (1898) 118 Ala. 477; or the place of payment, and if payable generally, the residence of the debtor; *Green's Bank* v. *Wickham* (1886) 23 Mo. App. 663; *Reimers* v. *Seatco County* (1895) 70 Fed. 573; or the residence of the debtor; *Bragg* v. *Gaynor* (1893) 85 Wis. 468; *Cross* v. *Brown* (1895) 19 R. I. 220; or the residence of the debtor or of the creditor; *Nat. B'way Bank* v. *Sampson* (1904) 179 N. Y. 213; *Newland* v. *Reilly* (1891) 85 Mich. 151; or wherever the debtor may be sued. *Neufelder* v. *Ins. Co.* (1893) 6 Wash. 336; *Mfg. Co.* v. *Lang* (1895) 127 Mo. 242. The decisions refusing fully to enforce statutes have assumed that the situs of a debt was fixed by immutable rules, and therefore the legislature could not bring that into the jurisdiction which existed without it. *L. & N. R. R.* v. *Nash, supra.* But the situs of a debt is a fiction of the law embodying a rule of law, which can be altered by legislation; and, therefore, as held in the principal case, due process of law is observed where one of the parties to the debt is before the court. *Harris* v. *Balk* (1905) 198 U. S. 215; *L. & N. R. R.* v. *Deer* (1906) 200 U. S. 176. To relieve the harshness of this rule, some courts require the garnishee to notify his non-resident creditor. *Harris* v. *Balk, supra; Morgan* v. *Neville* (1873) 74 Pa. St. 52.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—REGULATION BY STATE.—An action was brought against a corporation for doing business within the state without having therein a known place of business, and an authorized

agent upon whom process could be served. *Held*, that this statute was unconstitutional so far as it affected corporations engaged in interstate commerce. *Ryan Steamboat Line Co.* v. *Commonwealth* (Ky. 1907) 101 S. W. 403.

The court relied largely on cases under statutes imposing conditions precedent to the right of the corporation to do business within the state. Such a condition is clearly an unconstitutional regulation of interstate commerce. *McNaughton* v. *McGirl* (1897) 20 Mont. 124; *Gunn* v. *White Sewing Mach. Co.* (1892) 57 Ark. 24. But when no such condition is imposed, the cases under statutes similar to that in the principal case are not in accord. *Am. U. Tel. Co.* v. *W. U. Tel. Co.* (1880) 67 Ala. 26; *Cooper* v. *Ferguson* (1885) 113 U. S. 727, 736. Unless conflicting with federal statutes, the states may enact regulations affecting interstate commerce, which are local in their nature and operation, for the protection of the persons or property of their citizens. *County of Mobile* v. *Kimball* (1880) 102 U. S. 691; *Cooley* v. *Board of Wardens* (U. S. 1851) 12 How. 299; see 5 COLUMBIA LAW REVIEW 298. It would seem that the statute in question should be upheld under this rule. The requirement imposes no greater restriction upon interstate commerce than the requirement that railroads should fix rates during a certain month and post them in all stations, *Railroad Co.* v. *Fuller* (1873) 17 Wall. 560, or that all interstate trains should stop at certain stations within the state. *L. S. & M. S. Ry.* v. *Ohio* (1899) 173 U. S. 285.

CONSTITUTIONAL LAW—GOVERNMENT LICENSES—REVOKING WITHOUT A HEARING.—The relator, in accordance with an ordinance, held a license authorizing him to sell milk, which license was revoked without notice and a hearing. The Appellate Division, Second Department, upheld an order granting a peremptory writ of mandamus, compelling the Board of Health to rescind its action in revoking the license. *Held*, by the Court of Appeals, that a government license is neither property nor the subject of a contract with the state, but is revocable without notice or a hearing, and that mandamus will only be available when the action of the Board is "arbitrary, tyrannical and unreasonable." *People* v. *Dept. of Health* (1907) 38 N. Y. Law Jour., No. 9.

This case was fully treated in a note in 7 COLUMBIA LAW REVIEW 414, where issue was taken with the decision of the Appellate Division, and the same conclusion as to revocability was reached as that now established by the Court of Appeals. The court is unequivocal in its declaration that a license is revocable, which is not in any wise irreconcilable with the further proposition that a writ of mandamus might be obtained to compel the rescission of "arbitrary, tyrannical and unreasonable" revocation, for the issuance and revocation of licenses are but part of the exercise of the police power under which the sale of milk without a license is forbidden, and for abuse of the police power mandamus is the proper remedy.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—STATE TAXATION AFFECTING.—A state law exacted from foreign corporations a license fee, computed upon the total amount of their authorized capital stock, as a condition to their doing business within the state. In a suit to oust a telegraph company from the privilege of doing interstate business, it appeared that the income from interstate business alone was insufficient to maintain some of defendant's offices within the state. *Held*, that the law was not unconstitutional as regulating interstate commerce. *State* v. *Western Union Tel. Co.* (Kan. 1907) 90 Pac. 299. See NOTES, p. 529.

CONSTITUTIONAL LAW—"INTERSTATE COMMON LAW."—The state of Kansas brought an action to restrain Colorado's interference with the flow of the Arkansas River as it had always come down to Kansas, whereas Colorado, relying upon the western doctrine of riparian rights, claimed that by prior appropriation she had acquired the right to use large quantities of the water for irrigation. *Held*, that neither the common law nor the western rule

applied, but on broad principles of justice Colorado was justified, because the injury to Kansas was greatly less in proportion than the benefit to Colorado. *Kansas* v. *Colorado* (1907) 27 Sup. Ct. 655. See NOTES, p. 539.

CONSTITUTIONAL LAW—TAXATION—SITUS OF CREDITS.—A foreign insurance company doing business in Louisiana, loaned money to its insured, taking the policies as collateral. The notes and policies were immediately sent to the Home Office out of the jurisdiction. *Held*, a tax by Louisiana as for "credits, money loaned and bills receivable" was valid. *Metropolitan Life Insurance Company* v. *New Orleans* (1907) 205 U. S. 395.

Notes given by residents of Ohio to a resident of New York were held by the latter's agent in Indiana. *Held*, the mere presence of the notes in Indiana did not make them taxable there. *Buck* v. *Beach* (1907) 206 U. S. 392. See NOTES, p. 531.

CONTRACTS—ILLEGALITY—SUNDAY.—The defendant delivered a guaranty to the plaintiff's agent in Michigan on Sunday. It became a contract upon its approval by the plaintiff in Pennsylvania. *Held*, conceding it to be a valid Pennsylvania contract, it was not enforcible in Michigan. *International Text-book Co.* v. *Ohl* (Mich. 1907) 111 N. W. 768.

The contract having come into existence in Pennsylvania, its validity was determined by the law of that state. *Swann* v. *Swann* (1884) 21 Fed. 299. It was held unenforcible, however, on the ground that to give it effect would have validated the illegal acts done in Michigan. The Michigan statute has been construed to make all contracts where the whole transaction did not occur on weekdays, *Pillen* v. *Erickson* (1900) 125 Mich. 68, absolutely void and incapable of ratification. *Brazer* v. *Bryant* (1883) 50 Mich. 136. The majority of jurisdictions in which Sunday statutes are in force adopt a more lenient view, *Gibbs Mfg. Co.* v. *Brucker* (1883) 111 U. S. 597, Sunday contracts being regarded merely as *mala prohibita*, *Adams* v. *Gay* (1847) 19 Vt. 358, and capable of completion or ratification on a secular day; *King* v. *Fleming* (1874) 72 Ill. 21; and if made in a state where Sunday contracts are valid, will be enforced as being not contrary to morality. *Brown* v. *Browning* (1886) 15 R. I. 422. The principal case may be supported on the ground that the Michigan courts, although maintaining a position not taken by any others, may determine what is the public policy of their state, and what contravenes it. Minor, Confl. of Laws, §6; 4 COLUMBIA LAW REVIEW 375.

CONTRACTS—RESTRAINT OF TRADE—SECRET PROCESS.—The plaintiff, manufacturer of an unpatented proprietary medicine, sold the same under a system of contracts binding both wholesale and retail dealers to maintain certain prices. The defendant obtained a quantity of the medicine from persons bound by the contracts, and sold at a cut rate. An action was brought for an injunction. *Held*, the contracts were illegal as in restraint of trade. *Park & Sons Co.* v. *Hartman* (C. C. A. 1907) 153 Fed. 24.

The familiar doctrine that a patent right is a legal monopoly, 4 COLUMBIA LAW REVIEW 370, and the sale of patented articles exempt from the law of restraint of trade, *Edison Phonograph Co.* v. *Pike* (1902) 116 Fed. 863; *Victor Talking Machine Co.* v. *The Fair* (1903) 123 Fed. 424; *Bement* v. *National Harvester Co.* (1902) 186 U. S. 70, has been applied to the sale of unpatented articles made by secret process. *Dr. Miles Medical Co.* v. *Jaynes Drug Co.* (1906) 149 Fed. 838; *Dr. Miles Medical Co.* v. *Platt* (1906) 142 Fed. 606; *Ammunition Co.* v. *Nordenfelt* [1893] L. R. 1 Ch. 630. These decisions, however, appear to confuse the law applicable to the trade secret itself, and that applicable to the sale of the product of the trade secret; and two others, seemingly contrary to the principal case, involve but the single contract with the vendee defendant. *Elleman & Sons* v. *Carrington & Son* [1901] L. R. 2 Ch. 275; *Garst* v. *Harris* (1900) 177 Mass. 72. Restraint of trade is subject to the common law test of reasonableness save only where the government has granted monopoly under a patent; *Straus* v. *American*

Publishers' Assn. (1904) 177 N. Y. 473; *Hartman* v. *Park & Sons Co.* (1906) 145 Fed. 358; and it seems that a secret process assures an absolute monopoly of supply which, coupled with a system of contracts eliminating all possibility of competition throughout an extensive business—as in the principal case—might well be adjudged an unreasonable restraint of trade.

CORPORATIONS—DUTY OF DIRECTOR AS TRUSTEE—RENEWAL OF LEASE.—While the plaintiff corporation was seeking a renewal of its lease, the defendant, its director, outbid it and secured the lease for himself, covenanting against assignment and sublease. *Held*, the landlord not being a party, the plaintiff could have no relief. *Semble*, if the defendant had not so covenanted, he would have been decreed to hold the lease in trust for the plaintiff. *Jacksonville Cigar Co.* v. *Dozier* (Fla. 1907) 43 So. 523. See NOTES, p. 538.

CORPORATIONS—FOREIGN CORPORATIONS—DEFINITION OF DOING BUSINESS.—An officer of a corporation while in a foreign state for the purpose of discussing a proposed adjustment of a single controversy, was served with process there. *Held*, that the presence of such officer within the state did not constitute a "doing of business" such as to subject the corporation to the jurisdiction of a federal court therein by service of process on such officer. *Wilkins* v. *Queen City Savings Bank* (1907) 154 Fed. 173. See NOTES, p. 541.

DAMAGES—INJURY TO FRUIT TREES.—Locomotive sparks fired the plaintiff's orchard. *Held*, the measure of damages was the value of the trees destroyed, and not the difference in the value of the whole farm before and after the fire. *Louisville & N. R. Co.* v. *Beeler* (Ky. 1907) 103 S. W. 300.

The view adopted regards fruit trees, like timber and buildings, as having value measurable apart from the soil, *Whitbeck* v. *Railway Co.* (N. Y. 1862) 36 Barb. 644, though that value must be estimated with reference to their growing state. *Montgomery* v. *Locke* (1887) 72 Cal. 75. Under the doctrine rejected, *Dwight* v. *R. R. Co.* (1892) 132 N. Y. 199, fruit trees have no estimable value independently of the soil, and the injury is treated as a "permanent injury to the freehold," measured in diminished land value. *L. E. etc. R. R. Co.* v. *Spencer* (1894) 149 Ill. 97. Commonly the results under either rule should be identical, for purely orchard property depreciates commensurately with the injury to its fruit trees. *M. K. & T. Ry. Co.* v. *Lycan* (1897) 57 Kan. 635. But when damage to the orchard injuriously affects other parts of the tract, *Brooks* v. *C. M. & St. P. Ry. Co.* (1887) 73 Iowa 179, or where the aggregate values of the individual trees do not reach the entire real loss to the orchard, *Rowe* v. *C. & N. W. Ry. Co.* (1897) 102 Iowa 286, the present New York rule alone compensates. While it appears inadequate where the owner's user suffers disproportionately to the loss in market value, *Gilman* v. *Brown* (1902) 115 Wis. 1, 7,—(e. g. a few bearing trees on a large building plot)—that limitation marks the general rule of damages for permanent injuries to realty. Sedgwick, Damages, 8th. Ed. §§ 932, 939. Most of the authorities cited in the principal case either concern objects everywhere recognized as having value independently of the soil, *Fremont etc. Ry. Co.* v. *Crum* (1890) 30 Neb. 70; *Burdick* v. *Ry. Co.* (1893) 87 Iowa 384; *White* v. *Ry. Co.* (1890) 1 S. D. 326; or they rest mainly on the supposed justice of the verdict under the rule of the trial court. *Stoner* v. *Ry. Co.* (1893) 45 La. Ann. 115; *N. & W. R. R. Co.* v. *Bohannon* (1888) 85 Va. 293. Neither measure covers every situation, but the rule rejected seems preferable.

DAMAGES—PREVENTION OF PERFORMANCE—PROSPECTIVE PROFITS.—The plaintiff had agreed to construct a canal, for which the defendant was to supply timber. The defendant broke his contract because of difficulties met in fulfilling it. *Held*, prospective profits, being applicable only to wilful breaches, could not be recovered. *Harris* v. *Faris-Kesl Const. Co.* (Id. 1907) 89 Pac. 760.

The rule is well settled that where one contracting party has prevented the other from entering on or completely fulfilling the contract, the latter is entitled to recover the contract price for the work actually done, and the difference between the contract price and what it would cost him to perform the contract as to the residue, i. e. prospective profits. *Masterton* v. *Mayor* (N. Y. 1845) 7 Hill 61; *U. S.* v. *Behan* (1884) 110 U. S. 338; *Thompson* v. *Jackson* (Ky. 1853) 14 B. Mon. 114; *Salvo* v. *Duncan* (1850) 49 Wis. 151. These prospective profits, however, must be free from speculation, sufficiently certain to be capable of adequate proof, and reasonably within the contemplation of the parties. *Lanahan* v. *Heaver* (1894) 79 Md. 413; cf. *Bush* v. *Const. Co.* (1898) 88 Md. 665. The theory of the principal case that prospective damages are of a solely punitive nature is indefensible. *Winans* v. *Lumber Co.* (1884) 66 Cal. 61, 67; 3 Sutherland, Damages, 3rd Ed. 2179-80.

DOMESTIC RELATIONS—DIVORCE—ADULTERY—DEFENCE OF INSANITY.—A husband sued for absolute divorce on the ground of adultery; the wife was insane at the time of the act. *Held*, her insanity constituted a defence. *Kretz* v. *Kretz* (N. J. 1907) 67 Atl. 378.

In almost every jurisdiction insanity arising after the nuptials is itself not a ground for divorce. Stimson, Amer. Stat. Law, § 6201; 2 Bish., Marr., Div. & Sep. § 605; *Lloyd* v. *Lloyd* (1872) 66 Ill. 87; *Pile* v. *Pile* (1893) 94 Ky. 308; Statute 20 & 21 Vict. c. 85. "Divorce is granted not for misfortune but for fault." *Baker* v. *Baker* (1882) 82 Ind. 146. Accordingly insanity has been held a defence to divorce bills alleging cruelty, *McEwen* v. *McEwen* (N. J. 1854) 2 Stockton 286; *Hansell* v. *Hansell* (1894) 15 Pa. Co. Ct. Rep. 514; and desertion. *Storrs* v. *Storrs* (1904) 68 N. H. 118; *Blandy* v. *Blandy* (1902) 20 App. Cas. D. C. 535. Such decisions indicate that an essential element is voluntary disregard of the marital obligation. The view taken in *Matchin* v. *Matchin* (1847) 6 Pa. St. 332, (holding contrary to the principal case), that divorces are allowed for adultery mainly because of the danger of spurious issue, is wrong; for the husband's adultery is everywhere a ground for divorce. Stimson, *supra*, § 6201; Statute 20 & 21 Vict. c. 85. The decisions are not clear as to what degree of insanity must exist. But where the alleged adultery proceeds from general insanity, *Nichols* v. *Nichols* (1858) 31 Vt. 528, or such other defect of mind as to permit judicial commitment, the offence should be excused. On the other hand, in accordance with the true underlying principle, it has been held that a defence was not made out where the woman, though not free from delusions, was capable of appreciating the character of her act and its probable consequences. *Yarrow* v. *Yarrow* [1892] Prob. Div. 92. The doctrine of the principal case rests on reason and authority. Cf. *Broadstreet* v. *Broadstreet* (1811) 7 Mass. 474; *Wray* v. *Wray* (1851) 19 Ala. 522; (*semble*) *Rathbun* v. *Rathbun* (N. Y. 1870) 40 How. Pr. 328; (*semble*) *Hall* v. *Hall* (1864) 9 L. T. Rep. N. S. 810.

DOMESTIC RELATIONS—SECOND ADOPTION—NATURAL PARENTS—CONSENT.—A child, legally adopted by her paternal grandparents, was subsequent to their death adopted by her maternal grandmother. The Domestic Relations Law, § 61, subd. 3, required the consent to an adoption "of the * * * surviving parent of a legitimate child." *Held*, three judges dissenting, the second adoption was valid without the consent of, or notice to, the natural father. *In Re Macrae* (1907) 189 N. Y. 142.

The common law, unlike the Roman law on which the present statutory procedure is modeled, made no provision for adoption. *Ross* v. *Ross* (1880) 129 Mass. 243, 262; *Matter of Thorne* (1898) 155 N. Y. 140. When the consent of a "parent" is required, N. Y. Dom. Rel. Law, § 61, the "parent" referred to, is one with the rights and responsibilities of such. *Nugent* v. *Powell* (1893) 4 Wyo. 173. The natural parent is divested of all legal connection with a child on consenting to its adoption; N. Y. Dom. Rel. Law § 64; *In Re Cook's Estate* (1907) 187 N. Y. 253; *Humphries* v. *Davis* (1884)

100 Ind. 274; nor is his consent required to a second adoption provided the foster parents consent. N. Y. Dom. Rel. Law, § 66. Also, he cannot inherit from it, N. Y. Dom. Law, § 64; though the child may still inherit from him. 6 COLUMBIA LAW REVIEW 274. This severance of relationship after adoption imitates the Roman model. Justinian Lib. I, Tit. XI; *Vidal* v. *Commagere* (1858) 13 La. Ann. 516. The principal case is, therefore, correct.

EQUITY—JURISDICTION.—The defendant, wife of the plaintiff, committed adultery with a third party, by whom she had a child. She then by fraudulent misrepresentations induced the attending physician to certify that the plaintiff was its father. A statute gave the certificate evidentiary force to prove the paternity of the child. *Held*, that the false part of the certificate would be canceled, and the defendant enjoined from claiming under it. *Vanderbilt* v. *Mitchell* (N. J. 1907) 67 Atl. 97. See NOTES, p. 533.

EQUITY—RIGHT OF PRIVACY—INJUNCTION.—The defendants bought from the plaintiff his patent rights in a medicine that he had invented, and then proceeded, unauthorized, to publish his picture with the false certificate: "I certify that this preparation is compounded according to the formula devised and used by myself. Thos. A. Edison." *Held*, an injunction would issue. *Edison* v. *Edison Polyform Mfg. Co.* (N. J. 1907) 67 Atl. 392.

As the plaintiff was not a business competitor, the cases relating to the law of unfair trade have no application; and so far as the picture is concerned, the decision squarely affirms the existence of the right of privacy, following *Pavesich* v. *Life Ins. Co.* (1904) 122 Ga. 190, and the dissenting opinions in *Schuyler* v. *Curtis* (1895) 147 N. Y. 434, 452, and *Roberson* v. *Rochester Folding Bed Co.* (1902) 171 N. Y. 538, 557. The injunctions against the use of the plaintiff's name and the false certificate might be placed on a different basis, the risk of future liability or litigation arising therefrom; *Routh* v. *Webster* (1847) 10 Beav. 561; *Dixon* v. *Holden* (1869) L. R. 7 Eq. 488; *Walter* v. *Ashton* [1902] 2 Ch. 282; but the same right is ultimately protected, whatever the classification of the remedy. The principal case derives additional force from some recent holdings of the New Jersey Court of Errors and Appeals, see NOTES, p. 533; and would undoubtedly be sustained on appeal. As the plaintiff's name in the principal case was used for advertising purposes, an adequate remedy would now exist in New York. Laws, 1903, Ch. 132.

EVIDENCE—DYING DECLARATIONS—CONCLUSIONS OF FACT EXCLUDED UNDER OPINION RULE.—Deceased, in his dying declaration, stated that a certain person had requested him to arrest defendant who "was drunk and crazy; and he ran his family off from the house." "Q. And you fired in self-defense? A. Yes, sir." *Held*, that these statements were mere conclusions and inadmissible. *State* v. *Horn* (Mo. 1907) 103 S. W. 69.

While the majority of the cases hold that the Opinion rule is applicable to dying declarations, *State* v. *Elkins* (1890) 101 Mo. 344; *State* v. *Sale* (1902) 119 Ia. 1; *Collins* v. *Commonwealth* (Ky. 1876) 12 Bush. 271, the true theory would seem to be that, since the deceased cannot be further questioned as to specific facts, his conclusions are "indispensable." Wigmore, Ev. §1447. The word "opinion" has often been used in designating and excluding correctly a mere conjecture, *Kearney* v. *State* (1897) 101 Ga. 803; *State* v. *Burnett* (1900) 47 W. Va. 731; *Berry* v. *State* (1897) 63 Ark. 382, as distinguished from an inference based upon facts, which were or could have been observed by the declarant. Some courts have evaded an application of the Opinion rule by terming declarant's conclusion a "collective fact," *Sullivan* v. *State* (1893) 102 Ala. 135, 142, while some have merely characterized a statement as one of "fact" which was clearly opinion or inference. *Boyle* v. *State* (1885) 105 Ind. 469, 472; *Shenkenberger* v. *State* (1900) 154 Ind. 630; *Wroe* v. *State* (1870) 20 Oh. St. 460; and cf. *State* v. *Nettlebush* (1866) 20 Ia. 257. These decisions seem to indicate that the courts regard the results of an application of the Opinion rule to dying declara-

tions as undesirable. Were the Opinion rule discarded, the danger that the jury might be misled by such an inference of fact as the principal case presents, could be largely obviated by appropriate instructions, and this seems less of an evil than the retention of so inept a rule.

EVIDENCE—WITNESSES—REASONS FOR KNOWLEDGE OR RECOLLECTION.—In an action for injuries to a passenger in falling from the step of a street car, a witness testified that the car had started when the plaintiff attempted to get off, and that his attention was called to this because he "wondered whether she was going to try to get out of the car" while it was running. *Held*, that the witness' reason for his accuracy of recollection should be excluded. *Fulton* v. *Metropolitan St. Ry. Co.* (Mo. 1907) 102 S. W. 47.

This decision is put upon the ground that it would be "harmful and unjust" to admit in evidence statements the falsity of which, if in fact they are untrue, cannot be detected. It is undoubtedly the general rule, as the court says, to admit statements of circumstances which legitimately affect a witness' knowledge or recollection, even though they would otherwise be inadmissible, Wigmore on Ev. sec. 655; *Ry. Co.* v. *Clay, Adm'x.* (1895) 108 Ala. 233; *Scruggs* v. *Gibson* (1869) 40 Ga. 511; *Angell* v. *Rosenbury* (1864) 12 Mich. 241, 257; *Tomlinson* v. *Derby* (1876) 43 Conn. 562, and this rule has been followed in cases where, apparently, the same objection existed practically, although in a less degree potentially. *Tomlinson* v. *Derby, supra; R. R. Co.* v. *Van Steinburg* (1868) 17 Mich. 99, 107; *Ry. Co.* v. *Clay, Adm'x, supra.* In the principal case the court cites no authority in support of its position and it is doubtful if the decision can be upheld even in view of the novel state of facts presented.

NUISANCE—SMOKE.—Smoke and soot from defendant's factory discolored the exterior of the plaintiff's dwelling, causing discomfort and financial injury. The locality, although suitable for country homes, was so occupied only by the plaintiff. *Held*, an injunction would issue. *McCarty* v. *Natural Carbonic Gas Co.* (1907) 189 N. Y. 40.

This decision settles the law of New York in accordance with generally accepted principles. *Broadbent* v. *Imperial Gas Co.* (1857) 7 DeG., M. & G. 436; *Ross* v. *Butler* (1868) 19 N. J. Eq. 294; *Hurlbut* v. *McKone* (1887) 55 Conn. 31. Had there been merely an interference with the comfortable enjoyment of the plaintiff's property, the fact that the neighborhood could as yet hardly be termed residential might have occasioned an opposite result; 6 COLUMBIA LAW REVIEW 458; *Roscoe Lumber Co.* v. *Standard Silica Co.* (N. Y. 1901) 62 App. Div. 421; *Huckenstein's Appeal* (1871) 70 Pa. St. 102; but the smoke, although not a nuisance per se, *St. Louis* v. *Heitzeberg Packing Co.* (1897) 141 Mo. 375, caused the plaintiff such pecuniary loss as to present the clear case required that an injunction may issue.

PERSONAL PROPERTY—TRUST DEED—RULE IN SHELLEY'S CASE.—A trust deed transferred certain personal property to the trustee with power to pay the income to the grantor during life and after his death to pay over the fund to his heirs. *Held*, the Rule in Shelley's Case did not apply, and the grantor took a life estate only. *Sands* v. *Old Colony Trust Co.* (Mass. 1907) 81 N. E. 300.

Although the Rule in Shelley's Case is strictly applicable only to real estate, the same principle is applied by analogy to personalty. *Butterfield* v. *Butterfield* (1748) 1 Ves. Sr. 154; *Glover* v. *Condell* (1896) 163 Ill. 566; *Cockin's Appeal* (1885) 111 Pa. St. 26; *Hampton* v. *Rather* (1855) 30 Miss. 193; contra *Siceloff* v. *Redman* (1866) 26 Ind. 251; *Gross* v. *Shieber* (Del. 1885) 7 Houst. 280; *Herrick* v. *Franklin* (1868) L. R. 6 Eq. 593. The rule is one of law and not of construction; *Trumbull* v. *Trumbull* (1889) 149 Mass. 200; *Sheely* v. *Neidhammer* (1897) 182 Pa. St. 163; but in the application to dispositions of personal property it has been treated as a principle of construction which will yield to an apparent intention of the grantor. *Glover* v. *Condell, supra; Horne* v. *Lyeth* (Md. 1818) 4 Harr. & J. 431;

Bacon's Appeal (1868) 57 Pa. St. 504; *Taylor* v. *Lindsay* (1884) 14 R. I. 518; Gray, Perpetuities, § 647, note. From an examination of the deed in the principal case it is clear that the grantor did not intend to reserve more than a life interest in the property. The court endorses what seems a judicious departure from an obsolete technicality.

PLEADING AND PRACTICE—CONTEMPT—AFFIDAVIT.—An affidavit charging contempt, was based on "information and belief" merely. After an order to show cause, the accused voluntarily appeared and, pleading guilty, was sentenced. *Held*, no jurisdiction was acquired by the affidavit. *State ex rel. Harvey* v. *Newton* (N. D. 1907) 112 N. W. 52.

When the statute does not require an affidavit on personal knowledge, as it did not in the principal case, Revised Codes, N. D. 1895, § 5936, it seems a sounder rule that an affidavit, good in substance, though on information and belief, should be sufficient. *Ex parte Acock* (1890) 84 Cal. 50; *Jordan* v. *Circuit Court* (1886) 69 Ia. 177; *Pratt* v. *Stevens* (1884) 94 N. Y. 387. The principal case cites decisions where a warrant of arrest was issued; in such case a different rule would be justified, as this is an *ex parte* proceeding and in derogation of peronal liberty, *Kaeppler* v. *Bank* (1899) 8 N. D. 406, which considerations do not apply to an order to show cause. *People* v. *County Canvassers* (1892) 20 N. Y. Supp. 329. Furthermore, the voluntary appearance of the accused cures lack of jurisdiction caused by a defective affidavit, *People, ex rel. Barnes* v. *Court of Sessions* (1895) 147 N. Y. 290, or even by the want of an affidavit. *In re Cheesman* (1886) 49 N. J. L. 115; see *Warren* v. *Glynn* 37 N. H. 340. In jurisdictions where the affidavit also constitutes the accusation, personal knowledge of the affiant should not be necessary, as a clear statement of the acts charged will sufficiently inform the accused.

PLEADING AND PRACTICE—JUDGMENT—COLLATERAL ATTACK.—A judgment by default granted relief in excess of the demand of the complaint contrary to a statute which provided, "That as against a defendant who does not answer, the relief granted shall not exceed that demanded in the complaint." *Held*, that the judgment was subject to collateral attack. *Sache* v. *Gillette* (Minn. 1907) 112 N. W. 386.

The weight of authority sustains the proposition that the court transcends its jurisdiction in adjudicating on matters not relevant to the issues or in granting relief inconsistent with the complaint. Black, Judgments, 242; *Fairchild* v. *Lynch* (1885) 99 N. Y. 359; *Munday* v. *Vail* (1871) 34 N. J. L. 418; *McFadden* v. *Ross* (1886) 108 Ind. 512; *Spoors* v. *Coen* (1886) 44 Oh. St. 497. The principal case is in harmony with the general rule, if its interpretation of the statute as a direct limitation on the court's jurisdiction be adopted. A different interpretation of similar statutes has been reached in other states. *Harrison* v. *Union Trust Co.* (1895) 144 N. Y. 326; *Chase* v. *Christianson* (1887) 41 Cal. 253; *Mach* v. *Blanchard* (1902) 15 S. D. 432; *Ketchum* v. *White* (1887) 72 Ia. 193. It is there held that the rule is simply one of procedure for the protection of defendants, advantage of which must be taken by motion or appeal. The statute seems to be a formulation of the old equity rule on the subject; *Northern Trust Co.* v. *Albert Lea College* (1897) 68 Minn. 112; and as such it is difficult to see how it can be construed as a limitation on jurisdiction.

REAL PROPERTY—EASEMENTS IN GROSS—ASSIGNABILITY.—An owner in fee simple of land by an instrument under seal granted to an oil company the right to lay its pipes in his land. *Held*, such right was assignable by the grantee, and irrevocable by the grantor. *Standard Oil Co.* v. *Buchi* (N. J. 1907) 66 Atl. 427. See NOTES, p. 536.

STATUTES—AS NOTICE BEFORE DATE OF TAKING EFFECT.—A statute, to take effect ninety days after the date of its passage, required railway companies to maintain water closets at all stations, giving no time for their erection

after the act should take effect. *Held*, that the company was not required to take notice of the statute before the date it took effect, and the statute was therefore unconstitutional, as taking property without due process of law. *Missouri, K. & T. Ry. Co. of Texas* v. *State* (Tex. 1907) 100 S. W. 766.

A statute speaks from the time of its taking effect, *Price* v. *Hopkin* (1865) 13 Mich. 318; *Rice* v. *Ruddiman* (1862) 10 Mich. 125, 135, and is generally held to have no force prior to that date, for any purpose, *Cargill* v. *Power* (1850) 1 Mich. 369; *Charles* v. *Lamberson* (1855) 1 Ia. 435, 443, even as notice. *Price* v. *Hopkin, supra.* In some cases under statutes of limitation a contrary conclusion has been reached, on the ground that the legislature postponed the time of taking effect in order to give opportunity to bring suit. *Wrightman* v. *Boone Co.* (1897) 82 Fed. 412; *Duncan* v. *Cobb* (1884) 32 Minn. 460. But this view is generally not sustained. *State* v. *Swope* (1885) 7 Ind. 91; *Price* v. *Hopkin, supra.* The time between the passage of a statute and the date set for its taking effect is given in order that all may become familiar with its provisions. *Charles* v. *Lamberson, supra.* Unless, therefore, the legislative intent clearly appear to be otherwise, no one should be required to act under a statute prior to the date of its taking effect. *Gilbert* v. *Ackerman* (1899) 159 N. Y. 118; *Charles* v. *Lamberson, supra.* The principal case was, therefore, correct in holding the statute unconstitutional.

TAXATION—EXEMPTION OF NATIONAL SECURITIES.—Under a statute which required that stock of state banks should be assessed to the bank and not to the individual stockholder, United States government bonds owned by the plaintiff banks had been included in the valuation of the capital stock. *Held*, that the valuation should not include national securities. *Home Sav. Bank* v. *Des Moines* (1907) 27 Sup. Ct. 571.

For the purpose of taxing stockholders, United States bonds owned by a bank are included in the valuation of its stock; *Van Allen* v. *Assessors* (1865) 3 Wall. 573; and the tax may be required to be paid in the first instance by the corporation, leaving to it the right of reimbursement from the stockholders. *National Bank* v. *Kentucky* (1869) 9 Wall. 353; *Merchants' Bank* v. *Pennsylvania* (1897) 167 U. S. 461; *Cleveland Trust Co.* v. *Landers* (1902) 184 U. S. 111. In the principal case the tax was nominally levied on the stock, and was therefore sustained by the state court. *German Savings Bank* v. *Burlington* (1902) 118 Ia. 84; *National State Bank* v. *Burlington* (1903) 119 Ia. 696; *Home Savings Bank* v. *Des Moines* (Ia. 1904) 101 N. W. 867. But obviously the tax was really levied on the capital of the bank; otherwise one person would be taxed on property owned by another. While the practical results of the tax in the principal case may not be very different from those reached by collecting the tax from the bank as agent of the stockholders, the logical distinction is clear, and the principal case seems incontrovertible.

TAXATION—INHERITANCE TAX—PROPERTY IN HANDS OF EXECUTOR.—Act 109, Laws Louisiana, 1906, imposed an inheritance tax on "all successions not finally closed or in which the final account has not been filed." Over half of the testator's estate had been distributed before the passage of the act. A tax was assessed on the undistributed portion of the estate. *Held*, the act was constitutional. *Succession of Stauffer* (La. 1907) 43 So. 928.

The principle that the right to the succession vests in the legatee immediately on the death of the testator is not foreign to the law of Louisiana. *O'Donald* v. *Lobdell* (1831) 2 La. 299; *Succession of Provost* (1857) 12 La. Ann. 577; *Ware* v. *Jones* (1867) 19 La. Ann. 429; Code, Arts. 940-945. A statute imposing a tax upon a succession already vested in law, when the owner comes into beneficial enjoyment thereof, is unconstitutional. *Matter of Pell* (1902) 171 N. Y. 48. The principal case follows *Succession of Levy* (1905) 115 La. 378, and is supported by *Carpenter* v. *Commonwealth* (1854) 17 How. U. S. 456, but it appears to ignore the decision in *Tulane* v.

Board of Assessors (1906) 115 La. 1025. A tax upon a succession already "vested in right," although not "vested in fact," would seem to impair vested rights.

TORTS—DEATH BY WRONGFUL ACT—LIMITATION OF ACTIONS.—The plaintiff in New Jersey sued for the wrongful death of her intestate which occurred in Minnesota over six months before. The wrongful death statute of Minnesota limited the right of action to one year; while the similar New Jersey statute limited the right of action under it to six months. *Held*, the plaintiff's right was not barred in New Jersey. *Keep* v. *National Tube Co.* (1907) 154 Fed. 121.

In the case of statutes giving a right of action—as that for wrongful death—which did not exist at common law, *Insurance Co.* v. *Brame* (1877) 95 U. S. 754, and limiting the time within which the suit must be brought, this provision enters as a condition of the liability itself. *The Harrisburg* (1886) 119 U. S. 199, 214. Accordingly, when the *lex fori* recognizes the right to sue conferred by the *lex loci delicti*, it should recognize this substantive condition attached. *Boyd* v. *Clark* (1881) 8 Fed. 849; *Theroux* v. *R. R. Co.* (1894) 27 U. S. App. 508; cf. *Hill* v. *Supervisors* (1890) 119 N. Y. 344. The case would be different if the domestic provision was, in truth, a Statute of Limitations, and not solely applicable, as here, to the substantive right given by the domestic statute; since the laws of one state may not affect or regulate the procedure in another. *Weaver* v. *R. R. Co.* (1893) 21 D. C. 499, 506; cf. *Great Western Tel. Co.* v. *Purdy* (1896) 162 U. S. 329, 339; Burdick, Torts, 239. Under the facts, however, the principal case is correct.

TORTS—INNKEEPER'S LIABILITY—INSULT TO GUEST.—An innkeeper's servant in the course of his employment forced his way into a female guest's room late at night, and, accusing her of immoral conduct, ordered her to leave the hotel, and threatened her with proclamation as a disreputable person. *Held*, the guest could not recover against the innkeeper. *DeWolf* v. *Ford* (1907) 104 N. Y. Supp. 876.

By law the comfort and happiness of a passenger are largely in the control of the carrier; of the guest, in the innkeeper. The innkeeper assigns the room at will, *Fell* v. *Knight* (1841) 8 M. & W. 269, the guest is merely a licensee, *Rodgers* v. *People* (1881) 86 N. Y. 360; *Commonwealth* v. *Mitchel* (Pa. 1850) 2 Pars. Eq. Cas. 431, the innkeeper has access to the guest's room, and may assign him a different room, *Doyle* v. *Walker* (1867) 26 Up. Can. Q. B. 502, and his servants may eject the guest for cause. *State* v. *Whitby* (Del. 1854) 5 Harr. 494; *Commonwealth* v. *Mitchel, supra.* As an outgrowth of the similar semi-police power exercised by the carrier through his servants, and because of its liability to abuse, *Chamberlin* v. *Chandler* (1823) 3 Mason 242, the carrier is liable for his servant's insulting language and abusive conduct, although not amounting to assault or slander. *Chamberlin* v. *Chandler, supra; McGinnis* v. *Mo. Pac. Ry. Co.* (1886) 21 Mo. App. 399; *S. K. R. R. Co.* v. *Hinsdale* (1888) 38 Kan. 507; *Gillespie* v. *R. R. Co.* (1904) 178 N. Y. 347. For analogous reasons a majority of the courts in this country have held that the innkeeper was under a duty to protect his guests similar to that of the carrier, refusing to put an extended interpretation on the dictum in *Calye's Case* (1584) 8 Co. 32, that "if a guest is beaten in an inn, the innkeeper shall not answer for it." *Mosted* v. *Swedish Brethren* (1901) 83 Minn. 40; *Overstreet* v. *Moser* (1901) 88 Mo. App. 72; *Gilbert* v. *Hoffman* (1885) 66 Ia. 205; *Clancy* v. *Barker* (1904) 71 Neb. 83; *Chase* v. *Knabel* (Wash. 1907) 90 Pac. 642; Beale, Innkeepers, § 174; contra, *Clancy* v. *Barker* (1904) 131 Fed. 161. The rejection by the principal case of the result reached by the majority of the modern authorities is the more to be deplored because modern conditions compel an increasing number to depend on the inn for their comfort.

TORTS—INJURY—STATUTORY DUTY.—An action was brought for damages sustained because of an act done by the defendant under a contract prohibited by the Sherman Anti-Trust Act. Section seven provides that "any person who shall be injured by reason of anything forbidden or declared unlawful . . . may recover threefold damages." Defendant's act was no tort toward plaintiff at common law. The defense urged was that "injured" as used in the section quoted, meant a strict legal injury as recognized at common law. *Held*, the action was well brought. *Wheeler-Stenzel Co.* v. *National Window Glass Jobbers' Ass'n.* (1907) 152 Fed. 864.

Whether the word "injured" was used in its technical common law meaning—i. e. harm resulting from the commission of a tort—or merely as a synonym for "suffering loss" or "harmed," is immaterial. An act that might at common law result in "damage" merely, would, after a statute declaring such act illegal and criminal, result in strict legal injury, *Mogul Steamship Co.* v. *McGregor* [1892] App. Cas. 25, 46; *Parke* v. *Barnard* (1883) 135 Mass. 116, if the legislature contemplated the protection of the person harmed, *Taylor* v. *L. S. & M. S. R. R. Co.* (1881) 45 Mich. 74, as determined from the purview of the legislation and the language employed. *Atkinson* v. *Newcastle Waterworks Co.* (1887) 2 Exch. Div. 441; *Hayes* v. *Mich. Cent. R. R. Co.* (1884) 111 U. S. 228, 239. The Statute in the principal case in terms gives a remedy to all persons affected in their business or property. *Chattanooga Foundry* v. *Atlanta* (1905) 203 U. S. 390. The principal case is, therefore, correct.

WILLS—SALE OF REALTY BY TESTATOR.—ESCROW.—A deed of real property was delivered in escrow in pursuance of a contract made subsequent to a devise of said property. The condition happened after the testator's death. *Held*, the purchase money belonged to the devisee. *Van Tassel* v. *Burger* (1907) 104 N. Y. Supp. 273.

At common law, the least alteration in the testator's interest, 4 Kent 529; *Cave* v. *Holford* (1798) 3 Ves. Jr. 650, as by the delivery of a deed in escrow or a contract to convey, revoked the devise, *Mayer* v. *Gowland* (1779) 2 Dickens 563; *Walton* v. *Walton* (N. Y. 1823) 7 Johns. Ch. 258, this rule supposedly effectuating the intention of the testator. 1 Roll. Abr. 615. In New York it is now declared by statute that a devise shall be deemed revoked only by an act which completely divests the testator of his estate. 2 R. S. p. 64, §§ 45-48; cf. 1 Vict. c. 26. Thus, under a contract to convey not consummated before death the devisee now takes the purchase money. *Knight* v. *Weatherwax* (N. Y. 1838) 7 Paige Ch. 182; *Wagstaff* v. *Marcy* (1898) 54 N. Y. Supp. 1021. Nor does a delivery in escrow change this result; for nothing passes thereby until the happening of the condition; *Wheelwright* v. *Wheelwright* (1807) 2 Mass. 447; *Green* v. *Putnam* (N. Y. 1847) 1 Barb. 500; and the doctrine of relation is invoked only where necessary to uphold the grantor's deed and to prevent injury to the grantee. *County of Calhoun* v. *Emig. Co.* (1876) 93 U. S. 124; *Jackson* v. *Rowland* (N. Y. 1831) 6 Wend. 666. Accordingly, the principal case is sound.